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IN THE

SUPREME COURT OF THE UNITED STATES

No. 750

VINCENT CEFALU,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

Petition for Writ of Certiorari to Review Judgment of United States Court of Appeal, Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

No.

VINCENT CEFALU,

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versus

UNITED STATES OF AMERICA,

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Petition for Writ of Certiorari to Review Judgment of United States Court of Appeal, Fifth Circuit

---

PETITION FOR WRIT OF CERTIORARI

To the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Mr. Vincent Cefalu prays that a writ of certiorari issue to review the judgment of the United States Court of Appeal, Fifth Circuit, entered in the above entitled cause on February 11, 1955, affirming the judgment of the United States District Court for the Eastern District of Louisiana.

I.

OPINIONS DELIVERED IN THE COURTS BELOW

All opinions delivered in the Courts below are contained in the transcript of record. The only written opinion rendered in this case is contained in the transcript of record, pages 45, 46, 47 and 48, and in the supplemental record, pages 3, 4, 5 and 6, and was rendered by J. Skelly Wright, District Judge, on the motion to dismiss the indictment. The United States Court of Appeal, Fifth Circuit, rendered two decisions in this matter as will be shown hereinafter and as contained in the record, but did not see fit to render a written opinion in either instance.

II.

GROUNDS ON WHICH JURISDICTION OF THE COURT IS INVOKED

1) The judgment sought to be reviewed before this Court was rendered by the United States Court of Appeal, Fifth Circuit, being No. 14,942 on the docket of said Court of Appeal, and was filed on the 11th day of February, 1955.

2) Subsequently, petitioner made timely application for a rehearing in this matter before the United States Court of Appeal, Fifth Circuit, and an order was handed down by the said Court of Appeal denying a rehearing, which order was filed on the 28th day of March, 1955.

3) Petitioner believes that jurisdiction is conferred on this Court to review the judgment in question by writ of certiorari under and by virtue of the authority granted the

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United States Supreme Court by Title 28, Section 1254, U. S. C. A., which provides in part as follows:

Title 28, Section 1254, U. S. C. A.

"Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following method:

"1) By writ of certiorari upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . ."

III.

QUESTION PRESENTED FOR REVIEW

Petitioner was indicted on four counts charging income tax invasion. The charges in the indictment were very general and did not advise accused of specific acts with which he was charged. Counsel for petitioner requested a Bill of Particulars, and the Trial Judge granted, in part, defendant's application (See Statement of Case for details).

The purpose of a Bill of Particulars is largely to advise defendant of what facts, more or less in detail, he will be required to meet, and where the Bill of Particulars has been granted to the accused, the Court must limit the Government in its evidence to the facts set forth in the Bill of Particulars.

In the instant case, the Government in its answers to the Bills of Particulars stated that it was limiting itself to a net worth case and that it could not establish an accurate beginning and ending net worth statement for the defendant (See Statement of Case for details). Defendant then moved to dismiss the indictment on the grounds **not that the Government could not prove what it alleged, but if it proved every-**

thing it alleged, it would not prove a crime, under the rules as established for net worth cases. The matter presented for review is precisely the same issue presented in defendant's motion to dismiss the indictment.

It is not the contention of petitioner that the Bills of Particulars form a part of the indictment. Such a position would be unsound and would serve no useful purpose under the circumstances as they exist in this case. It is the contention of petitioner that the facts relied on by the Government and as set out in the various answers to the Bills of Particulars do not constitute the crime charged by the indictment.

IV.

STATUTES WHICH THE CASE INVOLVES

1) Title 26, Section 145 (b), U. S. C. A.

> "(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

2) Federal Rules of Criminal Procedure.

(a) Rule 7 (f) (Title 18, Rule 7, Page 139, U. S. C. A.).

> "(f) Bill of Particulars. The court for cause may direct the filing of a bill of particulars. A motion

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for a bill of particulars may be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires."

(b) Rule 11 (Title 18, Rule 11, Page 200, U. S. C. A.).

"Pleas. A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(c) Rule 12 (a); 12 (b) (1) (Title 18, Rule 12, Page 205, U. S. C. A.).

"(a) Pleadings and Motions. Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

"(b) The Motion Raising Defenses and Objections. (1) Defenses and Objections Which May Be Raised. Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion."

V.

STATEMENT OF THE CASE

Petitioner was indicted on four counts charging income tax evasion (Transcript of Record, pages 2, 3 and 4; Original Record, pages 2, 3 and 4), in Counts 1 and 2 for the year 1946 and in Counts 3 and 4 for the year 1947. Defendant was arraigned on April 8, 1953 (Transcript of Record, page 5; Original Record, page 5), and entered a plea of "Not Guilty" (Transcript of Record, page 5; Original Record, page 5).

Petitioner moved for a "Bill of Particulars" (Transcript of Record, pages 6, 7, 8, 9 and 10; Original Record, pages 6, 7, 8, 9 and 10). The motion was granted in part and denied in part (Transcript of Record, pages 11 and 12; Original Record, pages 11 and 12). The Government filed its "Answer to Motion for Bill of Particulars" (Transcript of Record, pages 11, 12, 13 and 14; Original Record, pages 11, 12, 13 and 14), which answer did not contain the information ordered by the Court to be furnished by the Government. Subsequently, petitioner filed a "Motion for a Better Bill of Particulars" (Transcript of Record, pages 15, 16, 17 and 18; Original Record, pages 15, 16, 17 and 18) and the Court granted petitioner's motion in part (Transcript of Record, pages 18 and 19; Original Record, pages 18 and 19). The Government filed an "Answer to Motion for Better Bill of Particulars" (Transcript of Record, pages 19 and 20; Original Record, pages 19 and 20), which answer did not comply with the order of the Court in that the Government failed to show the approximate number of machines used by the Government to determine the net worth of petitioner at the beginning and end of each of the years 1946 and 1947—instead the said answer (Transcript of Record, pages 19 and 20; Original Record, pages 19 and 20) reported

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the approximate number of machines **acquired** by the defendant during the years 1946 and 1947.

Petitioner then made a "Motion for Compliance with Order for a Better Bill of Particulars" (Transcript of Record, pages 21, 22, 23, 24 and 25; Original Record, pages 21, 22, 23, 24 and 25). It was ordered by the Court that the motion be granted as orally stated by the Court (Transcript of Record, pages 25 and 26; Original Record, pages 25 and 26). In compliance with this order, the Government filed "Amended Answer to Bill of Particulars" (Transcript of Record, pages 27, 28 and 29; Original Record, pages 27, 28 and 29). In said amended answer (Transcript of Record, pages 27, 28 and 29; Original Record, pages 27, 28 and 29), the Government stated, **"The Government is unable to prove the number of machines which defendant had on hand as of December 31, 1945, 1946 and 1947"** (Transcript of Record, page 29; Original Record, page 29). Defendant then moved to dismiss the indictment (Transcript of Record, pages 29, 30, 31, 32 and 33; Original Record, pages 29-33). This motion was heard and denied by the Court (Transcript of Record, page 34; Original Record, page 34; Supplemental Record, page 1; Transcript of Record, page 43; Ruling of Court, Transcript of Record, pages 45, 46, 47 and 48; Supplemental Record, pages 3, 4, 5 and 6), the petitioner taking an oral exception to the ruling of the Court and reserving all rights thereunder (Transcript of Record, page 48; Supplemental Record, page 6).

Therefore, petitioner withdrew the plea of "Not Guilty" and offered a plea of "Nolo Contendere," which plea was accepted by the Court (Transcript of Record, page 34; Original Record, page 34; Transcript of Record, page 48; Supplemental Record, page 6), and petitioner was sentenced to 181 days and

fined the sum of $2000.00, and cost of prosecution (Transcript of Record, page 35; Original Record, page 36).

Notice of appeal was duly filed (Transcript of Record, page 36; Original Record, page 36).

The question involved in the appeal and the manner in which it was raised was as follows.

Error of the Court in denying petitioner's "Motion to Dismiss the Indictment" raised by the above referred to motion and the exception and reservation taken thereto.

That thereafter, the following proceedings were had in this cause in the United States Court of Appeal for the Fifth Circuit.

The Government incorporated in its brief a Motion to Dismiss the Appeal, which was filed under date of August 14, 1954, which motion was not considered. On January 26, 1955, the matter was argued and submitted to the said Court of Appeal. The Court rendered an opinion dated February 11, 1955, affirming the judgment appealed from but failed to give written reasons for its judgment (Transcript of Record, pages 52 and 53).

Petitioner then petitioned the Court for a rehearing, which petition was filed March 2, 1955 (Transcript of Record, pages 54, 55, 56 and 57; Petition for Rehearing, pages 1, 2, 3 and 4), and the Court handed down an order denying the rehearing dated March 28, 1955 (Transcript of Record, page 58).

VI.

This is not a review of a judgment of a state Court.

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VII.

BASIS OF JURISDICTION OF FEDERAL DISTRICT COURT

Criminal action brought by the United States of America for alleged violation of a Federal criminal statute.

VIII.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The question presented is an important question of Federal law which has not been, but should be settled by the United States Supreme Court. The question involved was decided in a manner favorable to petitioner in *United States v. McKay* (District Court, Eastern District of Michigan) 45 Fed. Sup. 1001.

The three Bills of Particulars filed by the United States limit the Government to proof of the alleged evasion by means of a net worth method of computation. For the Government to prove a net worth case, it must establish an accurate authentic beginning and ending net worth statement for the years in question.

Bryan v. U. S., 5th Cir., 175 F. 2d 223;

U. S. v. Fenwick, 7th Cir., 177 F. 2d 488;

Demetrie v. U. S., 5th Cir., 207 F. 2d 892;

Holland v. U. S., 75 S. Ct. 127;

Friedberg v. U. S., 75 S. Ct. 138.

In the instant case, the Government has declared in its answer to the Bills of Particulars that it cannot show an

accurate authentic beginning and ending net worth statement for the years in question. If this case had been tried, the Government would not have been in a position to contradict this declaration, and as the facts set out by the Government in the various answers to the Bills of Particulars do not constitute the crime charged in the indictment, the indictment should have been dismissed.

U. S. v. McKay, supra.

As to the nature and functions of a Bill of Particulars, see:

United States v. Slaughter, D. C., D. C., 89 F. Supp. 205, 207;

Land v. United States, 4th Cir., 177 F. 2d 346, 348-349;

United States v. McKay, D. C., E. D., Mich. 1942, 45 F. Supp. 1001, 1004;

Wong Tai v. United States, 273 U. S. 77, 47 S. Ct. 300, 71 L. Ed. 545.

Commonwealth v. Giles, 1854, 1 Gray 466, 469, 67 Mass. 466, 469;

Commonwealth v. Snelling, 1834, 15 Pick 321, 32 Mass. 321;

United States v. Gouled, D. C., 253 F. 239;

Glasser v. United States, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680, modifying *United States v. Glasser*, 7 Cir., 116 F. 2d 690;

Dunlop v. United States, 165 U. S. 486, 17 S. Ct. 375, 41 L. Ed. 799;

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United States v. Adams Express Co., D. C. Iowa, 119 F. 240.

All opinions of the Courts below are contained in the record or attached hereto.

WHEREFORE, it is respectfully submitted that this petition for certiorari to review the judgment of the Court of Appeal for the Fifth Circuit should be granted.

ROLAND C. KIZER

FRANK S. CRAIG, JR.

F. A. BLANCHE

R. FRANK CANGELOSI, JR.,
707 La. Natl. Bank Bldg.,
Baton Rouge, La.
Of Counsel

PROOF OF SERVICE

I, R. FRANK CANGELOSI, JR., one of the attorneys for petitioner Vincent Cefalu, depose and say that on the _____ day of _____, 1955, I served copies of the foregoing petition for writ of certiorari to the Supreme Court of the United States on the several parties thereto as follows:

On the United States, by mailing a copy thereof in a duly addressed envelope with air mail postage prepaid to George R. Blue, United States Attorney for the Eastern District of Louisiana, Post Office Building, New Orleans, Louisiana, and by mailing a copy in a duly addressed envelope with air mail postage prepaid to the Solicitor General, Department of Justice, Washington 25, D. C.

_____

R. Frank Cangelosi, Jr.

SWORN TO AND SUBSCRIBED before me,

at Baton Rouge, Louisiana, this _____ day

of _____, 1955.

_____

NOTARY PUBLIC in and for the Parish of East Baton Rouge, State of Louisiana.

My Commission is for Life.

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OPINION OF THE COURT—FILED FEBRUARY 11, 1955

IN THE

UNITED STATES

COURT OF APPEAL

FIFTH CIRCUIT

No. 14942

VINCENT CEFALU,

Appellant

versus

UNITED STATES OF AMERICA,

Appellee

Appeal from the United States District Court for the Eastern District of Louisiana

---

(February 11, 1955)

Before HOLMES and BORAH, Circuit Judges, and DAWKINS, District Judge

PER CURIAM:

The judgment appealed from is affirmed.

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ORDER DENYING REHEARING

Extract from the Minutes of March 28, 1955

No. 14942

VINCENT CEFALU

versus

UNITED STATES OF AMERICA

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

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Cases:

Hudson v. *United States*, 272 U. S. 451 — 5

United Brotherhood of Carpenters v. *United States*, 330 U. S. 395 — 5

United States v. *Frankfort Distilleries*, 324 U. S. 293 — 6

United States v. *Norris*, 281 U. S. 619 — 7

Statute:

Internal Revenue Code of 1939:

Sec. 145 (26 U. S. C. 1952 ed., Sec. 145) — 2

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 750

VINCENT CEFALU, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The ruling of the District Court denying the petitioner's motion to dismiss the indictment (Supp. R. 3–6)* is not reported. The *per curiam* opinion of the Court of Appeals affirming the judgment of the District Court is reported at 218 F. 2d 956.

JURISDICTION

The judgment of the Court of Appeals was entered on February 11, 1955, and a petition for

*Record references to the "Original Record Received" are designated "R.". References to the "Supplemental Record" are designated "Supp. R.".

rehearing was denied on March 28, 1955. The petition for a writ of certiorari was filed on April 26, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

Whether petitioner's motion to dismiss the indictment, on the asserted ground that the Government could not have proved the allegations of the indictment, was erroneously denied.

STATUTE INVOLVED

INTERNAL REVENUE CODE OF 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

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STATEMENT

On February 3, 1953, in the United States District Court for the Eastern District of Louisiana, a four count indictment was filed against the petitioner, charging in counts one and three, the wilful attempted evasion of the petitioner's individual income tax liability for the years 1946 and 1947 and, in counts two and four, the wilful attempted evasion of the income taxes of the petitioner's wife, Frances P. Cefalu, for the same years. (R. 2–4.) The manner of the attempted evasion was alleged to have been the filing of false and fraudulent income tax returns, and the amounts of net income and the tax liability thereon, as reported in the returns and as corrected, were alleged to be as follows:

	Reported		Corrected	
	Income	Tax	Income	Tax
Count 1 (1946)	$4,150.55	$538.00	$11,048.12	$2,525.37
Count 2 (1946)	4,150.55	538.00	11,048.11	2,525.37
Count 3 (1947)	2,937.18	368.07	9,979.85	2,178.49
Count 4 (1947)	2,937.18	471.37	9,979.85	2,339.99

Petitioner was arraigned on April 8, 1953, and entered a plea of "Not Guilty". (R. 5.)

On the same date, petitioner moved for a bill of particulars (R. 5–10) requesting, among other things, that the court order the Government to describe in detail the net worth statements on the basis of which the indictment figures were computed (R. 9). Pursuant to the court's order

(R. 11), the Government filed a bill of particulars setting forth in detail the comparative net worth computations upon which the indictment figures were based (R. 11–14).

Thereafter, petitioner filed a "Motion for a Better Bill of Particulars," praying that the Government be required to show which of the statements on the income tax returns of the petitioner and his wife were alleged to be false and to supply a more detailed list of assets and liabilities included in the Government's net worth computations, together with the valuation placed on each particular asset or liability item. (R. 15–17.) The court granted this motion to the extent of requiring the Government to show the approximate number of coin-operated machines used in determining the petitioner's net worth. (R. 18–19.) The Government filed an answer setting forth the number of the various types of machines acquired by the petitioner during each of the years 1946 and 1947, and stating that the net cost of the machines acquired corresponded to the increases in this particular type of asset item shown on the net worth schedule previously furnished. (R. 19–20.)

Again the petitioner moved the court to order the Government to furnish particulars, and requested that the Government be ordered to show the approximate number of machines held by the petitioner at the beginning of 1946, 1947 and 1948. (R. 21–24.) This motion was granted (R.

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25–26), and an amended bill of particulars was filed, stating that the Government was unable to prove the number of such machines at the beginning of each such calendar year (R. 27–29).

Petitioner then moved to dismiss the indictment on the ground that "it would be impossible for the Government on trial of this case to prove beyond and to the exclusion of a reasonable doubt the beginning and ending net worth of the defendant as of the calendar years, 1946 and 1947." (R. 29–33.) This motion was denied, the court pointing out that the Government had stated that it would show the value of the machines ($11,000) at the beginning of the prosecution period (December 31, 1945), and that the offenses charged could be established without showing the precise number of such machines. (R. 34, Supp. R. 2–6.) Thereupon, a plea of *nolo contendere* was offered and accepted. (R. 34.)

Judgment of guilty was entered by the trial court on January 20, 1954, and the petitioner was sentenced to a term of imprisonment of 181 days and fined $2,000. (R. 35.) The Court of Appeals affirmed *per curiam*.

ARGUMENT

Although his plea of *nolo contendere* was "an admission of guilt" leaving open for review only the sufficiency of the indictment (*Hudson* v. *United States*, 272 U. S. 451, 455; *United Brotherhood of Carpenters* v. *United States*, 330 U. S.

395, 412; *United States* v. *Frankfort Distilleries,* 324 U. S. 293, 296), petitioner argues that the indictment should have been dismissed because the Government could not have proved its case. Even assuming that the *nolo contendere* plea leaves any basis for such a contention, petitioner's claim rests upon a readily corrected misconception of the record and is without merit.

The Government stated in its bill of particulars that it could not establish the *number* of coin-operated machines petitioner had on hand at the end of 1945, 1946, and 1947. (R. 29.) But the Government showed the *value* in money of such machines for these dates. (R. 12, 28.) Thus, petitioner is mistaken in his assertion (Pet. 9–10) that the Government acknowledged an inability to "show an accurate beginning and ending net worth statement for the years in question." Obviously, it would have been ample for the Government to prove the dollar value of these assets for the dates in question to establish the pertinent increases in petitioner's net worth.

We note, moreover, that petitioner's plea of *nolo contendere* forecloses the kind of inquiry he proposes into whether the Government could have proved his guilt. Though he attempts to formulate his argument as an attack upon the sufficiency of the indictment, it is clear that the indictment was a valid one and that the facts his plea admitted constituted the offense for which he was convicted. Petitioner made no effort to

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withdraw his plea. There was no basis for his attempt to litigate the issue of guilt that plea concluded. *United States* v. *Norris,* 281 U. S. 619.

CONCLUSION

The decision of the court below is clearly correct, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
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Special Assistants to the Attorney General.

MAY 1955.

U. S. GOVERNMENT PRINTING OFFICE: 1955